IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GUSTAVO FELIX NUNEZ,
Petitioner.

No. 2 CA-CR 2019-0087-PR
Filed November 15, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20154350001
The Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED IN PART AND GRANTED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
By Joshua Moser, Assistant Attorney General, Tucson
Counsel for Respondent

Robert A. Kerry, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Gustavo Nunez seeks review of the trial court's orders denying his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We grant review and partial relief, remanding the case to the trial court for an evidentiary hearing on Nunez's claim that his plea was rendered involuntary because counsel provided misleading information or failed to provide adequate information.

¶2 Nunez pled guilty to sixteen counts of aggravated assault, nine counts of practicing medicine without a license, and one count each of fraudulent schemes and artifice, conspiracy, and control of an illegal enterprise. He was sentenced to concurrent and consecutive prison terms totaling 38.25 years. Nunez sought post-conviction relief, arguing: (1) his plea was invalid because two attachments to the plea document containing the factual bases and sentencing ranges were unsigned; (2) his plea was induced by counsel's ineffectiveness, including that counsel had given him faulty information about the prison term he could face if he pled guilty, the conditions of his incarceration depending on whether he pled guilty or went to trial, and the burden of proof; (3) counsel were ineffective in failing to retain a medical expert; (4) some of his consecutive sentences violated double jeopardy and A.R.S. § 13-116; (5) his plea was involuntary because he was unaware he would be ineligible for probation, pardon, or other release; and (6) some of his sentences were "invalid" because the trial court did not comply with A.R.S. §§ 13-703(P) and 13-704(F) by notifying him in advance of sentencing that it intended to increase his sentences under those sections and, alternatively, that counsel was ineffective in failing to object.

¶3 The trial court summarily rejected all of Nunez's claims. But, despite determining "the plea is not invalid because of the lack of signatures by [Nunez]," the court noted the filed plea agreement did not include revisions transcribed by the judge at the change-of-plea hearing. It set an

evidentiary hearing "to determine why the signed plea and plea attachments that [Nunez] and [the judge] initialed are not filed in the record" and "if this in any way would affect the validity of the plea agreement." After that hearing, at which one of Nunez's two trial attorneys testified, the court denied the petition for post-conviction relief. This petition for review followed.

¶4 On review, Nunez repeats his claims. He first argues the plea is not "valid" because the two attachments in the record are unsigned. Rule 17.4(b), Ariz. R. Crim. P., states "[t]he terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor," and the plea must be filed.

¶5 "The provisions of Rule 17 are intended to insure the voluntary and intelligent quality of the plea" and, thus, an unwritten plea may be invalid. *State v. Lee*, 112 Ariz. 283, 284 (1975). However, the failure to comply with Rule 17.4(b) warrants relief only if the error causes prejudice. *See State v. Morris*, 115 Ariz. 127, 127 (1977). Nunez has not shown prejudice.

¶6 The unsigned attachments to the plea contain the range of sentences and the factual bases for the offenses to which Nunez pled guilty. Nunez has not argued they are inconsistent with the plea colloquy, during which Nunez admitted the factual bases and stated he understood the possible sentences he could receive. Nunez does not argue in his petition that he misunderstood the factual bases for his pleas of guilty and, although he suggests he did not fully understand the trial court's verbal recitation of the sentencing ranges, he has identified no specific confusion about the sentences he could face for each offense. And Nunez signed attachments to the plea—just not the copies filed with the court. Although he asserts the attachments he signed and the filed attachments could have varied, this claim is speculative. Nunez has not identified anything in the documents he signed that differs from the documents that were filed, or from the information given in the plea colloquy. Nunez is not entitled to relief on this claim.

¶7 Nunez also repeats his claim of ineffective assistance of counsel, asserting that he pled guilty because counsel misled him, inter alia, about the potential prison term he could face, what his incarceration conditions would be like if he went to trial instead of pleading guilty, and about the state's burden of proof. He further theorizes that counsel did so

to avoid a lengthy trial for a now-indigent client. He asserts he is entitled to an evidentiary hearing.

¶8 In his affidavit, Nunez claimed trial counsel had variously told him he would face no more than a sixteen-year or twenty-two-year prison term. He also avowed counsel had told him he would be placed in "a yard with 23-hour lock-down, 1 hour a day to shower and exercise" if he went to trial and was convicted, but would be placed "on an open yard" with "a semblance of a life" if he accepted a plea. Additionally, Nunez claimed counsel had advised him he "would be found guilty even if only one element of a charge against [him] was proven" and his "intent had no bearing on whether [he] would be found guilty." He further asserted he would not have pled guilty had he been properly advised of the potential sentence he could face, the conditions of imprisonment, or the state's burden of proof.

¶9 Nunez also provided an affidavit from an attorney, in which the attorney opined that the range of sentences described by trial counsel had consistently been unrealistic. The attorney further opined that, in his experience in speaking with "probably hundreds of prisoners or ex-prisoners," he had "never heard anyone claim that they received harsher prison conditions because of going to trial."

¶10 The trial court rejected Nunez's claims, concluding the plea colloquy showed there had been "no coercion" and he had been properly advised that the state would have to prove the charges beyond a reasonable doubt. The court did not explicitly address Nunez's claim that counsel had misrepresented his potential prison conditions but noted Nunez had provided only a "self-serving" affidavit and appeared to generally reject that affidavit as incredible.

¶11 A defendant is entitled to a hearing if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016). "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[A] defendant may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary." *State v. Banda*,

232 Ariz. 582, ¶ 12 (App. 2013). A defendant must show not only that his counsel was ineffective, but that he would have forgone the plea and gone to trial except for his attorney's error. *Id.*

¶12 We agree with Nunez that the trial court erred by rejecting his affidavit as incredible or dismissing it as merely "self-serving." In evaluating whether a claim is colorable and whether Nunez is thus entitled to an evidentiary hearing, we must assume the facts he has alleged are true. *See State v. Watton*, 164 Ariz. 323, 328 (1990). Although there are circumstances in which a trial court may discount a defendant's affidavit, those circumstances are not present here. For example, in *State v. Wilson*, we stated defendants must show "that they are entitled to Rule 32 review by more than just their own self-serving assertions" when attempting to "overcome the inference of waiver" resulting from failing to raise an issue on appeal. 179 Ariz. 17, 20 (1993). And, in *State v. Jenkins*, we observed a defendant must do more than contradict the record when claiming he was unaware he would be eligible for early release. 193 Ariz. 115, ¶ 15 (App. 1998). Additionally, allegations in an affidavit must be plausible and based on personal knowledge. *See State v. Krum*, 183 Ariz. 288, 292-93 (1995). But these cases do not suggest a trial court may reject a defendant's affidavit solely because it finds the defendant's assertions lack credibility or are "self-serving."

¶13 We agree with the trial court that Nunez's claim he did not understand the possible sentences does not warrant relief. Again, he does not suggest he was improperly advised of the potential sentences at the plea colloquy and has identified no confusion about his potential sentence for any particular offense, or the fact that he could be sentenced to consecutive terms. *See Jenkins*, 193 Ariz. 115, ¶ 15. But, we agree with Nunez that the mere advisement the state would have to prove his offenses beyond a reasonable doubt at trial does not fully mitigate his attorneys' alleged statement that the state would not have to prove each element of each offense and that his intent would not be relevant. And, if it is true that counsel advised him his prison conditions would be significantly more restrictive if he went to trial, and if that misinformation caused him to plead guilty, it could render his plea involuntary. Thus, Nunez is entitled to an evidentiary hearing to determine whether his counsel provided such information and, if so, whether that conduct drove him to admit guilt when he otherwise would not have done so. *See Banda*, 232 Ariz. 582, ¶ 12.

¶14 Nunez next asserts his trial counsel should have retained a "medical expert" to support his defense that, "in his hands," the scalpel and

other instruments he used in the unlicensed medical procedures were not dangerous instruments. First, by pleading guilty, Nunez has waived this claim except to the extent it affects the validity of his plea. *See State v. Leyva*, 241 Ariz. 521, ¶ 18 (App. 2017). Nunez, however, asserts he would not have pled guilty had counsel retained an expert because "his case would have been stronger," but he has not argued in his petition that the lack of a medical expert affected the validity of his guilty plea. Further, he has not provided this court with an affidavit by any medical expert and, thus, he has not demonstrated that retention of such an expert could have influenced his decision whether to plead guilty. "Rule 32 does not require the trial court to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims that people exist who would give favorable testimony." *State v. Borbon*, 146 Ariz. 392, 399 (1985) (claim not colorable in absence of affidavit from omitted witness).[1] For the same reason, Nunez's related claim that the expert's testimony might have been helpful to him at sentencing also fails.

¶15 Nunez further contends his consecutive sentences for some counts violate § 13-116 and double jeopardy. As we understand his argument, Nunez first contends that his enhanced sentences under § 13-708(D)—based on his having committed additional offenses while on release—violate § 13-116. He has not explained, however, why this would be so. Section 13-116 states: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Nunez has not identified any act for which he has been punished twice.

¶16 He also asserts his consecutive sentences violate the protection against double jeopardy, apparently because his convictions for

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[1]In his reply, Nunez argues *Borbon* is "plainly inapposite because it involved alibi witnesses who[se] testimony presumably was known, not an expert who was not consulted and whose opinion could not, therefore, be known." Nunez reads *Borbon* too narrowly. That case stands for the unremarkable proposition that we will not speculate about an unknown witness's potential testimony. *See also State v. McDaniel*, 136 Ariz. 188, 198 (1983) (claimant bears burden of establishing ineffective assistance of counsel and "[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation"); *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999) (to establish claim of ineffective assistance, petitioner must present more than "mere speculation" that prejudice resulted); *see also* Ariz. R. Crim. P. 32.5(d).

some charges did not precede his convictions for other charges. But he has cited no authority suggesting this fact is relevant to whether a violation of double jeopardy has occurred. Nor is it relevant to whether his sentence may be enhanced under § 13-708(D)—all that statute requires is that he commit the additional offense while on preconviction release from another offense.

¶17 Nunez further argues the trial court erred because it did not fully address the arguments raised in his motion to modify his sentence—specifically his claim the court was not permitted to "double count" that he committed offenses while on release by both enhancing and aggravating his sentence. The court did address that argument, however, observing that it had not both enhanced and aggravated his sentence for that reason, making it unnecessary for the court to further address his arguments under § 13-116 and double jeopardy. Nunez has not identified any error in the court's reasoning.

¶18 Nunez additionally reurges his claim that he would not have pled guilty had he been notified that he would be ineligible for a pardon for his dangerous offenses under A.R.S. § 13-704(G). Rule 17.2(a)(2) requires the trial court to inform a pleading defendant of "any special conditions regarding sentencing, parole, or commutation imposed by statute." A plea may be vacated if required notice is not provided under Rule 17.2(a)(2), but only if the defendant was otherwise unaware of the special condition and would not have pled guilty had he been aware of it. *See State v. Villegas*, 230 Ariz. 191, ¶¶ 6-7 (App. 2012).

¶19 Section 13-704(G) makes those guilty of a dangerous offense ineligible for "suspension of sentence, probation, pardon or release from confinement on any basis" except commutation, temporary release under A.R.S. § 31-233(A) or (B), or earned release under A.R.S. § 41-1604.07. Nunez argues, without analysis, that his ineligibility for a pardon is a "'special condition' affecting [his] sentence." In interpreting a court rule, we apply general principles of statutory construction and, thus, begin with the plain language of the rule. *State v. Silva*, 222 Ariz. 457, ¶ 13 (App. 2009).

¶20 We may presume items not included in Rule 17.2(a)(2) were excluded intentionally. *See Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 6 (App. 2013). Rule 17.2(b) refers to three categories of special statutory conditions: those regarding sentencing, parole, or commutation. Absent from this list is the relief Nunez identifies as critical to his decision to plead guilty: the availability of a pardon.

¶21 To the extent Nunez argues the unavailability of a pardon nonetheless is encompassed by Rule 17.2(a)(2) because it affects his sentence, we cannot agree. If our supreme court had intended the phrase "special conditions regarding sentencing" to be read so broadly, it would have been unnecessary to list other, specific forms of relief from a prison term—parole and commutation. *See Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503 (1991) ("The court must, if possible, give meaning to each clause and word in the statute or rule to avoid rendering anything superfluous, void, contradictory, or insignificant.").

¶22 And we disagree with Nunez that pardon and commutation are "substantially the same" and, thus, that the unavailability of pardon falls within Rule 17.2(a)(2). Both are available only at the discretion of the governor (after recommendation by the board of executive clemency). *See* Ariz. Const. art. V § 5; A.R.S. §§ 31-402, 31-443. But, despite this similarity, pardon and commutation are distinct. Commutation refers to "[t]he executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant." *Commutation*, Black's Law Dictionary (11th ed. 2019). In contrast, a pardon "officially nullif[ies] punishment or other legal consequences of a crime." *Pardon*, Black's Law Dictionary (11th ed. 2019). A pardon, therefore, may provide broader relief than the mere relief from a prison term resulting from commutation. And, the statutory scheme makes clear the procedures are distinct. For example, when considering commutation, the board must determine whether the sentence is "clearly excessive," § 31-402(C)(2), and a unanimous recommendation can become automatically effective absent action by the governor, § 31-402(D). In contrast, when considering a pardon application, the board generally must notify the county attorney, A.R.S. § 31-442(A), and has additional authority to require the trial judge or county attorney "to furnish the board, without delay, a statement of facts proved on the trial and any other facts having reference to the propriety of granting or refusing the pardon," A.R.S. § 31-441. In sum, the plain language of Rule 17.2(a)(2) does not require the trial court to advise a defendant that he will not be eligible for a pardon.

¶23 Relatedly, however, Nunez also asserts his trial attorneys were ineffective in failing to advise him about his ineligibility for pardon. And, he provided an affidavit by an attorney stating the failure to do so in these circumstances "was deficient representation under prevailing professional norms." Because Nunez's factual assertions must be taken as true, *Watton*, 164 Ariz. at 328, he is entitled to an evidentiary hearing on this

claim, at which he must show that no competent attorney in these circumstances would have failed to advise him about § 13-704(G) and that he would not have pled guilty had he been so advised. *See Banda*, 232 Ariz. 582, ¶ 12.

¶24 Last, Nunez repeats his claim that counsel were ineffective by failing to object when the trial court increased his sentence without providing notice as required by §§ 13-703(P) and 13-704(F). For repetitive offenders, § 13-703(P) requires the court to "inform all of the parties before sentencing occurs of its intent to impose an aggravated or mitigated sentence" but further provides a party "waives its right to be informed unless the party timely objects at the time of sentencing." Section 13-704(F) provides the sentencing range for those convicted of two or more dangerous offenses "that were not committed on the same occasion but that are consolidated for trial purposes." It prescribes a "Minimum," "Maximum," and "Increased Maximum" sentence; directs that the "minimum term prescribed shall be the presumptive term"; and requires that the court inform the parties "of its intent to increase or decrease a sentence pursuant to this subsection." *Id.*

¶25 Even assuming counsel fell below prevailing professional norms by not objecting under §§ 13-703(P) or 13-704(F), Nunez has not shown prejudice. *Bennett*, 213 Ariz. 562, ¶ 21. He has identified no argument his attorneys should have made regarding his aggravated sentences under § 13-703, or any argument that could have been made on review had counsel preserved the issue by objecting. And, for his repetitive, dangerous offenses subject to § 13-704(P), he asserts only that counsel could have challenged the dangerousness of the offenses. He does not explain how counsel could have done so, however, considering that he admitted committing dangerous offenses.

¶26 We grant review and partial relief. We remand the case to the trial court for an evidentiary hearing to determine whether counsel gave improper or inadequate advice to Nunez and, if so, whether his guilty plea was involuntary because that advice was critical to his decision to plead guilty. We otherwise deny relief.